In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 621

T. KIMBALL HILL, PETITIONER

v.

UNITED STATES ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

During 1963, T. Kimball Hill, the petitioner, met several times with a Revenue Agent to discuss his income tax returns for 1961 and 1962. At a meeting on October 18, 1963, the Revenue Agent mentioned to the petitioner that substantial dividends first appeared in his 1962 return and asked where he had obtained the funds to acquire the stock. The petitioner stated in effect that he was glad that this was in the open and that he had had trembling hands ever

since the investigation began. After that meeting, the Revenue Agent referred the case to his superiors, suggesting that there might be fraud. (R. 38-39.)[1]

In January, 1964, a Special Agent of the Internal Revenue Service met with the petitioner and displayed his commission. The petitioner expressed a desire to cooperate fully and gave business records to the Special Agent. On February 26, 1964, the petitioner attended a question-and-answer conference in the District Director's office in San Diego where he was advised of his rights under the Fourth, Fifth and Sixth Amendments. Subsequently the petitioner continued to cooperate and turned over additional business records to the Internal Revenue Service. On February 28, the petitioner admitted that he kept two sets of books and that the second set was transcribed to agree with the figures shown in his tax returns. (R. 39-41.)

On March 25, 1964, the petitioner sought a restraining order and filed a motion for return of property and for its suppression as evidence against him in any criminal proceeding. (R. 2.) The district court granted a temporary restraining order but, after a hearing, dismissed the order and denied petitioner's motion. (R. 17, 32, 44.) The petitioner, an oral surgeon, alleged a need for the business records —particularly the patient record cards—in his office. (R. 13-14; Tr. 22-23.)[2] At the suggestion of the dis-

---

[1] "R" references are to Volume I of the Transcript of the Record below.

[2] "Tr." references are to Volume II of the Transcript of the Record below.

trict court and in order to prevent the disruption of petitioner's practice, the government copied petitioner's records and returned to him the originals, except for the altered patient record books[3] which were open to inspection by the petitioner at any time. (Tr. 42-43, 86-87.)

On appeal, the court of appeals noted the district court's arrangement for the return of petitioner's business records and the failure of the petitioner to show that the government had not complied with that arrangement. It found that the appeal was solely from the order denying the motion to suppress evidence (Pet. 39-40.) and ruled that such an order was not appealable (Pet. 41).

The question presented here is whether an order denying a motion designed to suppress the use of evidence in a future criminal proceeding is appealable in advance of indictment. Whether an order is independent and appealable is determined by a pragmatic test. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546; *Cogen* v. *United States*, 278 U.S. 221, 225. With the arrangement of the district court for the return of petitioner's business records, his need for those records was satisfied and there was no compelling need for an immediate appellate determination.

Since *DiBella* v. *United States*, 369 U.S. 121, it has been settled that an order granting or denying

[3] The information contained in the record books appears to have been taken from the cards (R. 61-62, 65-66) which were returned.

a motion which aims principally at the suppression of evidence is not appealable even if the appeal is taken before the return of an indictment. On the authority of *DiBella*, this Court granted certiorari in three cases which had allowed such appeals and, in each case, vacated the decision and remanded with instructions to dismiss the appeal. *Murphy* v. *United States*, 369 U.S. 402; *Grant* v. *United States*, 369 U.S. 401; *Greene* v. *United States*, 369 U.S. 403.[4] As stated in *DiBella* (pp. 131-132):

> Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.

As the court of appeals held in the instant case (Pet. 41), the fact that the motion is anticipatory does not obscure its purpose or make the order appealable.

---

[4] The petitioner does not cite these cases. Instead, he purports to rely on cases decided before *DiBella*, *supra*, none of which involves the type of appeal attempted in this case. Of those cases he cites that were decided after *DiBella*, only one —*Lord* v. *Kelley*, 223 F. Supp. 684 (D. Mass.)—is applicable. In that case, Judge Wyzanski said of a pre-indictment motion to suppress and return that (p. 688) "the adjudication of the trial court is immunized from appellate review." On appeal, the court of appeals dismissed for lack of jurisdiction. 334 F. 2d 742 (C.A. 1). This Court denied certiorari. 379 U. S. 961.

The decision below is correct. There is no conflict among the circuits and no occasion for review by this Court.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH M. HOWARD,
THOMAS SILK,
Attorneys.

NOVEMBER 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1965 782741 220